

22-5060

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

FRED AUSTON WORTMAN, III,

Petitioner,

v.

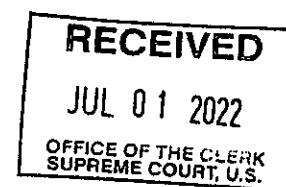
STATE OF TENNESSEE, ET. AL.,

Respondents.

ON APPEAL FROM
THE SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Fred Auston Wortman, III, respectfully petitions the Court for a writ of certiorari of Fred Auston Wortman, III v. State of Tennessee, et. al., (6th Cir. February 14, 2022).

QUESTIONS PRESENTED

1. Whether the District Court erred by summarily dismissing Petitioner's Complaint by failing to accept as true all of Petitioner's factual allegations and drawing all reasonable inferences in favor of Petitioner.
2. Whether the District Court erred by failing to protect Petitioner's due process rights because the District Court failed to enforce the terms of an Alford Plea Agreement by compelling the State to fulfill its obligations under the Alford Plea Agreement which the State had previously entered into with Petitioner.

PARTIES TO THE PROCEEDING

The Petitioner in this case is F. Auston Wortman, III. Petitioner is an individual.

The Respondents are the State of Tennessee, the Tennessee Board of Parole, Gary Faulcon, Gay Gregson, Roberta Kustoff, Richard Montgomery, Tim Gobble, Zane Duncan, Barrett Rich, Rob Clark, Jim Purviance, Gayle Barbee, Richard O'Bryan, Mark Edward Davidson, Paul

Hagerman and f/n/u Stewart. The Respondents are the State of Tennessee and persons who are employees of, agents of, and representatives of the State of Tennessee. The individual Respondents are being sued in both their official and individual capacities. Reference to the Respondents is made to their respective surnames.

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OPINIONS BELOW

The following unreported opinions are included in the Appendix:

- I. Fred Auston Wortman, III v. Tennessee, et. al., No.3:20-cv-00159 (M.D.Tenn. Apr. 3, 2021, ruling on petition to alter or amend issued May 27, 2021).
- II. Fred Auston Wortman, III v. Tennessee, et. al., No.20-5718 (6th Cir. Sept.23, 2021, ruling on petition for rehearing February 14, 2022).

Petitioner filed his verified Complaint in the U.S. District Court for the Middle District of Tennessee in February 2020 alleging several causes of action including: breach of contract, tortious interference, various violations of due process, conspiracy, collusion, fraud, fraudulent concealment, and illegally influencing government operation.

Petitioner's Complaint contained factual allegations that the State breached an agreement that the State had entered into with Petitioner. Also, Petitioner alleged that state employees had acted outside the scope of their duties to induce the State to breach its obligations under an agreement.

The District Court entered its order dismissing Petitioner's Complaint on April 3, 2020, before any discovery occurred and before a hearing on the merits. For reasons unknown to Petitioner, the District Court did not

accept Petitioner's factual allegations as true; and, the District Court did not draw any reasonable inferences in favor of Petitioner. The District Court mischaracterized Petitioner's Complaint and summarily dismissed Petitioner's verified Complaint without permitting Petitioner the opportunity to engage in discovery or have a hearing on the merits of the Complaint.

Petitioner filed a motion in the District Court requesting that the District Court alter or amend its dismissal pursuant to Federal Rule of Civil Procedure 59. The District Court denied this motion on May 27, 2021.

Petitioner timely filed his notice of appeal to the Sixth Circuit Court of Appeals. The Sixth Circuit Court of Appeals issued its ruling on September 23, 2021. Petitioner filed a petition for rehearing. The Sixth Circuit Court of Appeals issued its ruling on Petitioner's petition for rehearing on February 14, 2022.

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254. The due process clauses of the V and XIV Amendments also give this Court jurisdiction to hear this matter because Petitioner seeks to compel enforcement of a plea agreement which is a unique contract that raises special due process protections. The special due process protections give this Court jurisdiction.

STATEMENT OF THE CASE

Petitioner filed his verified Complaint with the District Court in February 2020. The District Court summarily dismissed Petitioner's Complaint without accepting any factual allegations as true and without drawing any reasonable inferences in favor of Petitioner. The District Court erroneously stated that the causes of action that Petitioner alleged were not subject to remedy. However, Petitioner provided caselaw authorities that confirmed that Petitioner is, in fact, entitled to equitable remedies, such as specific performance, and other remedies for the State's breach of the Alford Plea Agreement (hereinafter referred to as "Agreement") and violation of the sentencing court judgment order (hereinafter referred to as "judgment order"). Also, Petitioner alleged facts that certain Respondents acted outside the scope of their duties to negatively impact Petitioner. Petitioner alleged that the Respondents engaged in ex parte communications which are illegal. As this Court has stated, anytime that a government employee acts outside the scope of their duties, such as participating in ex parte communications, then the government employee is subject to liability. Petitioner argues that the District Court should have allowed this matter to proceed.

Petitioner's Complaint, among other remedies, seeks to enforce his special due process rights to compel the State to fulfill the promises and obligations that the State made which induced Petitioner to enter into the Agreement, which is attached in the Appendix. Petitioner's position is articulated, in general, by the U.S. Court of Appeals for the Sixth Circuit, in U.S. v. Warren, 8 F.4th 444 at 448 (6th Cir.2021), which stated:

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). In other words, a defendant has a due process right to hold the government to the promises it made that induced him to plead guilty. *Id.*; see *United States v. Barnes*, 278 F.3d 644, 648 (6th Cir.2002).

...
To satisfy these high standards, the government must do more than pay lip service to its obligations—we forbid “not only explicit repudiation of the government’s assurances” but also “end-runs around them.” *Id.* (quoting *United States v. Saxena*, 229 F.3d 1, 6 (1st Cir.2000)). **(Emphasis added).**

Petitioner entered into the Agreement with the State based on the prosecutors' promise that the portion of the sentence that Petitioner would serve in incarceration would be 30% of the total sentence and then Petitioner would be released. The sentencing court accepted the Agreement, which included the provision that Petitioner would serve 30% of the sentence in incarceration and would be released. Based on the representations by the State, the sentencing court memorialized the

Agreement, pursuant to Tennessee Rule of Criminal Procedure 11, in a judgment order, which is attached in the Appendix. The mutual understanding between the State and Petitioner, which was expressed in the Agreement, is that Petitioner would be released upon Petitioner's completion of service of 30% of the total sentence in incarceration.

One request for relief that Petitioner's Complaint seeks is to compel enforcement of the Agreement because Petitioner fulfilled his obligation by completing service of 30% of the sentence in incarceration on or before October 7, 2019, as calculated by the State. However, even though Petitioner fulfilled his obligation under the Agreement, the State breached the Agreement, and violated the judgment order because, the State failed to release Petitioner. The State's failure to release Petitioner is a breach of the Agreement and a violation the judgment order.

Is it worth your time and are there significant reasons to read further?

In fact, there are

The following questions are presented at the outset for the purpose of saving you, the judicial clerk reader, your time. If you answer no to any of the following questions, then it is probably not worth or the efficient use of your time to read any further. However, if you answer yes to these questions, reading further is not only worth, and an efficient use of, your

time, but also, answering yes to these questions weighs in favor of this Court reviewing this matter and granting Petitioner relief such as remanding this matter so that this matter can proceed to a hearing on the merits.

First question, once approved by a trial court, are plea agreements enforceable and unique contracts that have the benefit of special due process protections and safeguards? If plea agreements are enforceable contracts against the government that have special due process protections, then you will want to read further. Second question, when deciding a motion to dismiss, are district courts required to accept as true all factual allegations and to draw all reasonable inferences in favor of Petitioner? If federal trial courts are required to accept as true all factual allegations and to draw all reasonable inferences in favor of Petitioner, then you will want to read further.

Michael D. Cicchini, prominent commentator, author, and lawyer, has been and continues to be a leading figure advocating the view that "the government compromises the integrity of the system when it makes promises as part of a plea bargain and then reneges on those promises, often after obtaining from the defendant the very benefit for which it [the government] bargained." Michael D. Cicchini, Broken Government Promises: A Contract-Based Approach To Enforcing Plea Bargains, 38

N.M.L. Rev. 159, 195. In this matter, the State breached the provisions of the Agreement as alleged and detailed in Petitioner's Complaint.

Petitioner continues to find himself in a swamp of disfavor because of his status as an inmate. See (i) Teaster v. Tennessee Dept. of Correction, 1998 WL 195963 at *2 (Tenn.Ct.App.1998) ("While '[p]risoners are not a favored group in society;...prisoners bringing actions...are invoking their fundamentally imprescriptible right to liberty. It is our duty to see to it that these claims receive fair consideration. That sense of duty drives our decision...."); and, (ii) Taylor v. Campbell, 2001 WL 109387 at *4 (Tenn.Ct.App.2001) ("Even though prisoners are not a favored group in society, they are entitled to fair and even-handed consideration."). Even though Petitioner may not be a sympathetic litigant, the acts and omissions by the State, violate numerous authorities. Petitioner argues that protections of law are in place to protect unsympathetic litigants and to ensure that their arguments are determined on the merits after review of all of the essential and necessary documents and facts. In this regard, Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso conducted a study showing empirical data that inmates are not a favored group and do not receive full, fair, and meaningful review. *Extraneous factors in judicial decisions*, 108 Proc.Nat'l Acad.Sci. 6889, (2011). The Danziger study

concluded that parole decisions are substantially influenced by extraneous variables, such as time of day of the parole hearing or whether the decision-maker had recently eaten. The U.S. District Court for the Eastern District of California opinion in Joseph v. Swarthout, No. CIV S-11-0260 JAM GGH P, 2011 WL 6293369 (E.D.Cal2011) highlights just one aspect that evidences the lack of meaningful review of matters raised by inmates. In the context of parole hearings, the Joseph Court ruled that the denial of 99.7% of initial parole hearing applicants is “unlawful”. The Joseph Court at *1 stated:

[T]his matter proceeds ... as to [the] ...unlawful practice of denying parole in 99.7% of the initial parole hearings ... which this court has understood as a “bias of the adjudicator” due process claim.

This Court in Franklin v. Gwinnett County Public Schools, 503 U.S. 60 at 66, 112 S.Ct. 1028 (1992) opined that:

“Where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946).

The Sixth Circuit Court of Appeals in United States v. Barnwell, 477 F.3d 844 at 845 (6th Cir. 2007) expressed the thought as follows:

When we fail to protect a defendant’s fundamental rights, we fail in our calling as judges. “This is not merely a matter of ethics; it is part of a defendant’s right to due process and

effective representation,"...both constitutional rights we have sworn to uphold.

In this matter, Petitioner has not been given any opportunity, whatsoever, to be heard in order to enforce his fundamental due process right to compel the State to comply with and fulfill its promises and obligations under the Agreement and judgment order.

STANDARD OF REVIEW

The standard of review for this Court is a *de novo* review of the summary dismissal of Petitioner's Complaint. Petitioner raised in his verified Complaint his objection to the State's material breach of the Agreement even though the District Court did not give Petitioner the opportunity to present the Agreement for enforcement. See (i) Warren at 448 ("Because Warren objected to the government's alleged breach, we review whether the government breached his plea agreement *de novo*."); (ii) U.S. v. Fields, 763 F.3d 443 at 453 (6th Cir. 2014) ("Whether the governments conduct violated the agreement is a question of law, to be reviewed *de novo*. *Id.* In general, the trial court should hold the government to "a greater degree of responsibility than the defendant ... for imprecisions or ambiguities in ... plea agreements." [internal citations omitted].); (iii) Bose Corp. v. Consumers Union of U.S., 466 U.S. 485, 104 S.Ct. 1949, 80 L.d.2d 502 (1984); and (iv) Scheuer v. Thodes, 416 U.S.

232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). Also, pursuant to Doe v. Baum, 903 F.3d 575 at 581 (6th Cir. 2018), the Court must accept as true all factual allegations contained in the Complaint; and, all reasonable inferences must be drawn in favor of Petitioner.

THE AGREEMENT AND THE JUDGMENT ORDER SHOULD BE
JUDICIALLY NOTICED

Federal Rule Of Evidence 201 requires the Court to take judicial notice of the Agreement and the sentencing court judgment order because the “accuracy of these documents cannot reasonably be questioned.”

Federal Rule of Evidence (hereinafter sometimes referred to as "FRE") 201, *Judicial Notice of Adjudicative Facts*, authorizes a court to take judicial notice, "at any stage of the proceeding", of the Agreement and judgment order because the Agreement was approved and accepted by the sentencing court and memorialized as a judgment order pursuant to Tennessee Rule of Criminal Procedure 11. Tennessee Rule of Criminal Procedure 11 is substantially similar to Federal Rule of Criminal Procedure 11; and the interpretation and application of Tennessee Rule of Criminal Procedure 11 is also substantially similar to Federal Rule of Criminal Procedure 11. Specifically, Tennessee state courts and federal courts have ruled that once a court accepts a plea agreement no party, not even

the court, can alter, modify, or breach the plea agreement. Further, the State is to perform the terms of the plea agreement and the judgment order "meticulously". The following cases support these principles: (i) Freeman v. U.S., 564 U.S. 522 at 529, 131 S.Ct. 2685, 180 L.Ed.2d 519 (2011) ("Rule 11(c)(1)(C) makes the parties' recommended sentence binding on the court 'once the court accepts the plea agreement,'...."); (ii) U.S. v. Scurlark, 560 F.3d 839 at 842 (8th Cir.2009) ("Accordingly, '[a] plea agreement under Rule 11(c)(1)(C), like all plea agreements, is binding on both the government and the defendant, but Rule 11(c)(1)(C) plea agreements are unique in that they are also binding on the court *after* the court accepts the agreement.'"); (iii) U.S. v. Green, 595 F.3d 432 at 438 (2nd Cir. 2010) ("[O]nce the court has accepted it, the Rule 11(c)(1)(C) plea agreement 'dictate[s] the sentence'"); (iv) U.S. v. Scanlon, 666 F.3d 796 at 798 (D.C. Cir.2012); (v) U.S. v. Presley, 18 F.4th 899 at 907 (6th Cir.2021)(Moore, concurring) ("[O]nce the district court accepts the plea agreement, it is bound by the bargain." [internal citation omitted].); (vi) U.S. v. Hodge, 306 Fed.Appx. 910 at 914 (6th Cir.2009) (No party can modify or alter a plea agreement once accepted by the court.); (vii) State v. Coleman 2018 WL 1684365 (Tenn.Crim.Ct.2018); (viii) Robinson v. Whisman, 2012 WL 1900551 (Tenn.Ct.App.2012); (ix) State v. Howington, 907 S.W.2d 403

(Tenn.1995); (x) State v. Lane, 2015 WL 8029834 at *5 (Tenn.Crim.App.2015); (xi) U.S. v. Foster, 527 Fed.App. 406 (6th Cir.2013); and (xii) U.S. v. Ligon, 937 F.3d 714 at 718 (6th Cir. 2019).

The Tennessee Supreme Court in State v. Soller, 181 S.W.3d 645 at 648 (Tenn.2005), ruled that once a sentencing court accepts a plea agreement, the agreement cannot be altered by anyone:

Once the Court decides to accept a plea agreement reached pursuant to Rule 11(e)(1)(C), it must accept the agreement in its entirety, including the agreed upon sentence. See *State v. Leath*, 977 S.W.2d 132, 135-136 (Tenn.Crim.App.1998). Rule 11 does not contain a provision that would allow a trial court to alter the terms of a plea agreement entered.... (Emphasis added).

The Soller Court, at 650, continued:

We conclude that when a trial court accepts a plea agreement pursuant to Tennessee Rule of Criminal Procedure 11(e)(1)(C), such agreement represents the full and complete agreement between the parties and cannot be altered....(Emphasis added).

See also State v. Rogers, 2009 WL 3233520 at*4 (Tenn.Crim.App.2009) (“Our supreme court has held that plea agreements are enforceable once accepted by the trial judge.”); and State v. Bobo 2016 WL 7799284 at *5 (Tenn.Crim.App.2016).

The Tennessee Court of Criminal Appeals in Coleman discussed Tennessee Rule of Criminal Procedure 11(c) explaining that a “Type C”

plea is one in which the State and defendant "agree that a specific sentence is the appropriate disposition of the case." Coleman at *10. In this matter, Petitioner and the State entered into a plea that is classified as Type C plea agreement because the State and the Petitioner agreed to the specific sentence that Petitioner would serve; namely that Petitioner would serve 30% of the sentence in incarceration and upon completion of service of 30% of the sentence in incarceration, Petitioner would be released. Pursuant to Coleman, neither the Petitioner, nor the Court, nor the State nor any of the State's departments, divisions, or boards, has the authority to alter, amend, modify, or breach the Agreement that was entered into.

The Coleman Court at *11 continued to explain:

When the parties have entered a plea agreement which is dispositive of all sentencing issues, the trial court may accept the plea, but in doing so, "it must accept the agreement in its entirety, including the agreed upon sentence." *State v. Soller*, 181 S.W.3d 645, 648 (Tenn.2005). Rule 11 does not contain a provision that would allow a trial court to alter the terms of the plea agreement" under subsection (c)(1)(C), and the trial court lacks authority to do so. *Id.* (concluding that trial court erred when it accepted a plea agreement with an agreed-upon sentence and then subsequently granted the defendant judicial diversion). ... This Court held that when a plea is contingent upon a sentence, the trial court has no authority to unilaterally reduce the sentence. *Id.* (Emphasis added).

The above cases stand for the principle that a plea agreement, once accepted by a court, cannot be modified by the court, the State, the

defendant, or any one. The plea agreement is a special contract which binds the State, the defendant, and the court. The State is required to perform the obligations that it agreed to in the plea agreement, including release of the defendant once the defendant completes the agreed to percentage of service in incarceration.

The attached Agreement verifies that the State, through the State's statutorily authorized agents, agreed that Petitioner would serve 30% of the sentence in incarceration and then upon completion of service of 30% of the sentence in incarceration, Petitioner would be released. Specifically, the Agreement states in pertinent part that the State agrees that the specific sentence would be "30 years @ 30%", meaning that Petitioner would serve 30% of the sentence in incarceration and upon completion of service of 30% of the sentence in incarceration Petitioner would be released from incarceration.

Petitioner relies on FRE 201 to bring to the attention of the Court the documents, the judgment order and the Agreement, which compel the State to release Petitioner because Petitioner has fulfilled his obligation by completing service of 30% of the sentence in incarceration as agreed to and provided in the plea agreement and the judgment order. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 at 322, (2007) ([C]ourts

must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motion to dismiss, in particular, documents incorporated into the complaint by reference, and matters which a court may take judicial notice.). Both the judgment order and the Agreement were filed by the sentencing court clerk in the court's records; accordingly, the "accuracy of these documents cannot reasonably be questioned."

Petitioner requests that this Court accept and take notice of the Agreement and the judgment order pursuant to FRE 201 because, the written Plea Agreement and the judgment order are adjudicative facts and because courts have taken judicial notice of plea agreements and judgment orders in other matters. The Agreement clearly and expressly binds and obligates the State to release Petitioner upon Petitioner's completion of 30% of the sentence in incarceration. Based upon the State's calculations, Petitioner completed service of 30% on or before October 7, 2019; and, Petitioner should have been immediately released at that time.

Petitioner argues that this Court must take judicial notice of the Agreement and the judgment order because these documents cannot reasonably be questioned. The sentencing court accepted the Agreement, in its entirety, including the provision that Petitioner would be released upon

completion of service of 30% of the sentence in incarceration. The Agreement and judgment order are clear that Petitioner would be released upon completion of 30% of the sentence. The Agreement cannot be altered, modified, or breached in any way by the State and must be "meticulously performed" by the State. See Ligon, at 718, and Warren.

However, the State has failed to fulfill its obligations under the Agreement because the State has not released Petitioner even though Petitioner fulfilled his obligations under the Agreement by completing the agreed to percentage of service in incarceration. Petitioner relies on his due process protections, as articulated by this Court, to compel the State to fulfill its obligations under the Agreement.

As particularly relevant to this matter, the Coleman Court at *9, stated as follows regarding the irreparable harm to the judicial process and judicial integrity by the court's not upholding the provisions of a plea agreement:

While we agree with both parties that the alterations to the plea agreement were minimal, the violence that was done to the orderly administration of justice and to the integrity of the judicial process was extensive. The court's actions were grossly improper in that they shrouded the judicial process in obscurity and undermined confidence in the impartiality of the judicial system.

In this matter, the State's refusal to comply with and fulfill its obligations under the Agreement, is not only a "minimal" alteration of the

Agreement but an outright and devastating breach of the release provision of the Agreement; and, an express violation of the judgment orders. The violation and breach by the State highlights the “extensive” “violence to the integrity of the judicial process” and “undermined confidence in the impartiality of the judicial system.” This Court should take judicial notice of the Agreement and the judgment orders and enforce the Agreement by compelling the State to release Petitioner because, Petitioner detrimentally relied on the representations by the State and, accordingly, completed his obligation of serving 30% of the sentence in incarceration. The State’s failure to fulfill its obligation under the Agreement to release Petitioner is a breach of a “promise of a state official in his public capacity” and a breach of a “pledge of the public faith” when the “public justifiably expects the State, above all others, to keep its bond.” Howington at 408.

ARGUMENT

QUESTION NUMBER ONE – Whether the District Court erred by summarily dismissing Petitioner’s Complaint by failing to accept as true all of Petitioner’s factual allegations and drawing all reasonable inferences in favor of Petitioner.

Petitioner alleged facts in his Complaint that give rise to claims and causes of action which are subject to remedy.

Petitioner relies on Doe v. Baum, at 581 which states:

When evaluating a complaint's sufficiency, courts use a three-step process. First, the court must accept all of the plaintiff's factual allegations as true. [internal citation omitted]. Second, the court must draw all reasonable inferences in the plaintiff's favor. ... And third, the court must take all of those facts and inferences and determine whether they plausibly give rise to an entitlement to relief. [internal citation omitted]. If it is at all plausible (beyond a wing and a prayer) that a plaintiff would succeed if he proved everything in his complaint, the case proceeds. (Emphasis added).

In this matter, Petitioner alleged facts that are violations of law by all of the Respondents. Also, Petitioner averred that remedies are available to the violations committed by the Defendants. Specifically, Petitioner alleged that the State breached the Agreement by filing to release Petitioner from incarceration even though Petitioner completed the agreed to percentage of service in incarceration. Petitioner argued that the remedy for such a breach is to compel the government to specifically perform the terms of the agreement. Also, Petitioner specifically alleged facts that certain individual Respondents engaged in tortious actions, including tortious interference, fraud, and violations of Petitioner's due process rights. Petitioner also alleged facts that certain individual government employees engaged in actions that did not fall within the scope of their duties and are not protected by immunity of any type.

Petitioner alleged the following facts, which must accept as true:

- a. Petitioner and the State entered into an Agreement which was accepted, approved, and entered as a judgment order by the sentencing court.
- b. The Agreement stated that Petitioner would be released when Petitioner completed service of the agreed to 30% of the sentence in incarceration.
- c. Based upon the State's calculations, Petitioner completed service of 30% of the sentence and was to be released on or before October 7, 2019. However, Petitioner remains incarcerated despite the plain language of the Agreement. Petitioner alleged that based on the State's failure to comply with the express provisions of the Agreement, the State breached the Agreement.
- d. Stewart engaged acts for the purpose of exerting undue influence over a government employee in order to violate Petitioner's due process rights.
- e. Davidson, Faulcon, and other Respondents willfully participated in illegal, ex parte communications for the purpose of influencing the administrative tribunal to breach the Agreement. The ex parte communications violated Petitioner's due process protections because Petitioner was not notified of the ex parte communications. During the course of the ex parte meetings, a plan was devised and agreed to by Respondents to breach the Agreement; to violate Petitioner's due process rights; and to engage in tortious acts to injure Petitioner.

- f. Clark, Purviance, Barbee, O'Bryan, Gregson, Kustoff, Montgomery, Gobble, Duncan, Rich and Hagerman knew about the ex parte communications and engaged in acts to conceal the ex parte communications. Also, each Respondent, individually and collectively, engaged in acts to violate Petitioner's due process rights; to tortiously interfere with court orders; to tortiously interfere with government operations; and to engage in tortious interference.
- g. Davidson and Hagerman gave diametrically contradictory testimony to two different tribunals. Petitioner argues that the testimony of Davidson and Hagerman during the administrative tribunal was a breach of the agreement; tortious interference with the sentencing court's judgment order, and fraudulent misrepresentation. See Ligon. These Respondents acted outside the scope of their authorized duties by testifying contradictory before two different tribunals.

One revealing error that highlights and embodies the District Court's failure to accept all of Petitioner's factual allegations as true is that the District Court made speculative comments regarding the Agreement even though the District Court did not have the Agreement before it to review. The District Court's failure to accept as true Petitioner's factual allegations, of the existence of the Agreement and the promises and obligations

imposed on the State contained in the Agreement, prevented Petitioner from being meaningfully heard despite the robust due process protections that provide Petitioner with the vehicle to compel the State to fulfill its promises and obligations. Petitioner argues that the District Court should have taken the factual allegation as true that the State's promise and obligation as expressed in the Agreement. The District Court's error on this material issue prejudiced Petitioner from being meaningfully heard. By failing to accept the Agreement, the District Court prevented Petitioner from asserting his due process rights that attach to the promises and obligations that the State made that induced Petitioner to enter into the Agreement. The District Court erred by failing to uphold the special due process rights that must be fiercely protected by compelling the State to fulfill its promises and obligations which were made by state officials in their public capacity. The pledge of the public faith is not to be lightly disregarded because the public justifiably expects the State, above all others, to keep its bond. See Foley v. State, 2020 WL 957660 at *6 (Tenn.Crim.App.2020) and State v. Lane, 2015 WL 8029834 at *5 (Tenn.Crim.App.2015). It remains a mystery how the District Court commented on the Agreement despite not having the Agreement before it. Surely special due process protections allow

Petitioner to seek specific performance and other remedies for breach of the Agreement.

Petitioner also argues that he is entitled to the benefit of all reasonable inferences that can be drawn from the alleged facts, including, but not limited to the following inferences:

- a. Davidson acted in nefarious ways during the course of the administrative process and during the ex parte meetings by influencing government employees to materially breach the provisions of the Agreement. The ex parte communications that Davidson participated in with other Respondents violated Petitioner's due process protections. Petitioner is entitled to the inference that Davidson tortiously interfered with Petitioner's due process rights for the State to comply with the terms of the Agreement. Further, Petitioner is entitled to the inference that Davidson induced Faulcon and other Respondents, during the ex parte meetings, to breach the Agreement and engage in other illegal and tortious acts against Petitioner.
- b. Davidson and Hagerman's testimony gives rise to the inference that they breached the Agreement, tortiously interfered with court orders, and gave false and fraudulent testified to either a court or an administrative tribunal.

- c. Petitioner is entitled to the inference that the mere appearance of impropriety by Davidson and Hagerman testifying contrary to the provisions of the Agreement and the sentencing court's judgment order are violations of the rules of professional conduct.
- d. Petitioner is entitled to the inference that the ex parte communications among Davidson, Faulcon, and other Respondents violated Petitioner's due process protections by inducing the State to breach the Agreement.

While there are numerous other reasonable inferences that arise from the factual allegations contained in Petitioner's verified Complaint, which Petitioner argues he should have the opportunity to prove at trial, if the above four (4) examples are not sufficient to obtain relief then it appears that continuing examples of reasonable inferences would not be sufficient to obtain relief from this Court.

Petitioner's verified Complaint contains factual allegations that describe and detail acts and omissions by the Respondents, individually and collectively, that give rise to numerous claims and causes of action including, but not limited to: (i) Tortious interference in various forms; (vii) Engaging in actions that are outside the scope of duties; (ix) Fraudulent concealment of the illegal, ex parte communications among Davidson, Faulcon and other Appellees; (x) Willful violation of, and tortious

interference with, trial court orders; (xi) Tortious interference with contract; (xii) Breach of contract; (xiii) Tortious interference with government operations; (xiv) Tortious interference with and violation of Appellant's substantive and procedural due process protections; (xv) Violations of the rules of professional and judicial conduct.

Petitioner argues that there are remedies available to address these claims and causes of action.

Relief sought by Petitioner at this stage of the proceedings

The relief sought by Petitioner, at this point in the proceedings, is to vacate and reverse the summary dismissal of Petitioner's Complaint; and, to remand this matter so that the Complaint may proceed.

QUESTION NUMBER TWO – Whether the District Court erred by failing to protect Petitioner's due process rights because the District Court failed to enforce the terms of an Agreement by compelling the State to fulfill its obligations under the Agreement which the State had previously entered into with Petitioner.

Petitioner has special due process protections to compel the State to fulfill its obligations under the Agreement.

The Tennessee Court of Criminal Appeals in Foley v. State, 2020 WL 957660 at *6 (Tenn.Crim.App.2020) discussed the special due process

protections surrounding plea agreements that compel the enforcement of the promises and obligations made by the state by stating:

In addressing breach of plea agreements, courts of this state have applied the principles of contract law to construe the agreement and determine the appropriate remedy. *State v. Mellon*, 118 S.W.3d 340, 346 (Tenn.2003).

“ ‘Plea agreements … are unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguards obtain.’” *United States v. Ready*, 82 F.3d [551,] 558 [2nd Cir.1996)] (quoting *Carnine v. United States*, 974 F.2d 924, 928 (7th Cir.1992)); see also *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir.1986) (the defendant’s underlying “contract” right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law).

Id. “The U.S. Supreme Court held that ‘when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.’” *Eric Boyd v. State*, No.E2001-02096-CCA-R3-PC, 2002 wl 31289175 at *2 (Tenn.Crim.App. Oct. 10, 2002) (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)), perm.app.denied (Tenn.Fed.18, 2013). “A breach of that agreement, even where due to unforeseen or changed circumstances, does not lessen the impact of the breach, and a guilty plea based on ‘a false premise … cannot stand.’” *Id.* “[A] defendant may not, consonant with due process guarantees, be held to his negotiated plea of guilty when the promises upon which it was based remain unperformed by the prosecution.” *Mellon*, 118 S.W.3d at 346 (citations omitted). “[T]he promise of a state official in his public capacity is a pledge of the public faith and is not to be lightly disregarded. The public justifiably expects the State, above all others, to keep its bond.” *State v. Howington*, 907 S.W.2d 403, 408 (citations omitted).

Further, the Third Circuit Court of Appeals, in Bitzer v. Superintendent Camp Hill SCI, 820 Fed.App. 116 at *120 (3rd Cir.2020), in discussing that a breach of a plea agreement must be remedied when the government fails to fulfill its promises and obligations under a plea agreement, stated:

“[T]he Supreme Court clearly established that” if a prosecutor fails to fulfill a promise in a plea agreement, “that breach must be remedied regardless of whether the defendant was prejudiced thereby.” Dunn, 247 F.3d at 458 (citing Santobello 404 U.S. at 261—63, 92 S.Ct. 495); see also Puckett v. United States, 556 US. 129, 141, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) (noting that if a breach of a plea agreement has been established, “Santobello did hold that automatic reversal is warranted when objection to the Government’s breach of a plea agreement has been preserved”).

Petitioner argues that (i) the prosecutors breached the Agreement by testifying before the administrative tribunal that the State should ignore and breach the Agreement by increasing the percentage of service in incarceration even though the prosecutors testified to the sentencing court that the Agreement should be accepted; and, (ii) that the State breached the Agreement by failing to release Petitioner when he completed the agreed to percentage of service in incarceration. Petitioner relies on due process rights to compel the State to remedy its breach of the Agreement.

Petitioner argues that he has special due process rights and protections “to hold the government to the promises it made that induced” Petitioner to enter the Agreement. Warren, at 448.

Federal and state courts apply special due process protections to enforce plea agreements when the government fails to perform its obligations under plea agreements. See the following cases: (i) Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, (1971); (ii) Ligon, at 718; (iii) Warren at 448 (“In other words, a defendant has a due process right to hold the government to the promises it made that induced him to plead guilty” and “To satisfy these high standards [of due process], the government must do more than pay lip service to its obligations—we forbid ‘not only explicit repudiation of the government’s assurances’ but also ‘end-runs around them.’”); (iv) U.S. v. Pelletier, 898 F.2d 297 at 302 (2nd Cir. 1990); (v) Bitzer v. Superintendent Camp Hill SCI, 820 Fed.App.116 (3rd Cir.2020); (vi) Foley v. State, M2018-01963-CCA-R3-PC, 2020 WL 957660 at *6 (Tenn.Crim.App. Feb. 27, 2020); and (vi) Kraus v. U.S., 48 F.3d 1221 at *3 (7th Cir.1995) (“Plea agreements, though, are unique contracts ‘in which special due process concerns for fairness and the adequacy of procedural safeguards obtain.’”)

In fact, the due process rights protecting a defendant's ability to enforce a plea agreement are so strong and robust that a defendant can seek the remedy of specific performance against the government to compel the government to fulfill the government's obligations under the plea agreement. The defendant can seek to compel the government to perform the terms of the plea agreement in order to hold the government to the promises and obligations that the government made that induced the defendant to enter into and execute a plea agreement. The following cases support Petitioner's argument: (i) U.S. v. Pelletier, 898 F.2d 297 at 301-302 (2nd Cir.1990) ("The remedies available in event of breach as well as the conditions constituting breach are governed by the agreement. Unlike the normal commercial contract, however, due process requires that the government adhere to the terms of any plea bargain ... it makes." [internal citation omitted].); (ii) State v. Mellon 118 S.W.3d 340 at 346 (Tenn. 2003) ("Tennessee courts have held that where the State breached a plea agreement, or some other infirmity occurred that was not caused by the defendant, but which invalidated the agreement, the remedy for breach was to allow the defendant to choose either specific performance or withdrawal of the plea." [internal citations omitted].); (iii) U.S. v. Boatner, 966 F.2d 1575 at 1578 (11th Cir.1992) ("A defendant is entitled to specific

performance of an agreement which he enters with the government and which induces a plea of guilty. []. Whether the government violated the agreement is judged according to the defendant's reasonable understanding at the time he entered his plea."); (iv) U.S. v. Taylor, 77 F. 3d 368 (11th Cir.1996) (Plea agreement is subject to specific performance by government); (v) Ligon, at 720-721 (6th Cir. 2019) ("We have interpreted *Santobello* to mean that '[a] breached plea agreement may be remedied by either specific performance of the agreement or by allowing the defendant to withdraw the plea.'"); (vi) U.S. v. McQueen, 108 F.3d 64 (4th Cir.1997); (vii) U.S. v. Canada, 960 F.2d 263 (1st Cir.1992); and (viii) Foley v. State, M2018-01963-CCA-R3-PC, 2020 WL 957660 at *7 ((Tenn.Crim.App. Feb. 27, 2020) ("In the event of a breach, the available remedies are generally specific performance" [internal citations omitted].).

Petitioner alleged in his Complaint that the State breached the Agreement and violated the judgment order by failing to fulfill its obligation under the Agreement to release Petitioner from incarceration because Petitioner had fulfilled his obligation to serve 30% of the sentence in incarceration. Astonishingly, the State breached the Agreement by failing to release Petitioner to fulfill the State's obligation under the Agreement even though the State had calculated that Petitioner had completed service

in incarceration as agreed to in the Agreement. However, the District Court dismissed Petitioner's Complaint without accepting as true Petitioner's factual allegations, including the existence of, and provisions of the Agreement and the sentencing court's judgment orders.

The government breached its promises and obligations under the Agreement by failing to release Petitioner.

In further support of Petitioner's argument that Respondents, individually and collectively, violated his due process rights is the plain language of the Tennessee Court of Criminal Appeals in State v. Lane, 2015 WL 8029834 (Tenn.Crim.App.2015), which stands for the proposition that there are greater due process rights which protect the integrity of plea agreements and a more significant burden on the government to perform the obligations that the government promised in the Agreement. The Lane Court at *5 stated:

Cooperation-immunity agreements, like plea agreements, are enforceable as contracts. *Howington*, 907 S.W.2d at 408; *State v. Spradlin*, 12 S.W.3d 432, 435 (Tenn.2000). However, a cooperation-immunity agreement "is different from the average commercial contract as it involves a criminal prosecution where **due process rights must be fiercely protected.**" *Howington*, 907 S.W.2d at 410. Initially, the defendant must show the existence of an agreement by a preponderance of the evidence; thereafter, the State bears the burden of showing "'beyond a reasonable doubt why the agreement is invalid or why prosecution should be allowed despite the agreement.' ' [internal citations omitted.]. **(Emphasis added).**

In further support of the sanctity of plea agreements, the Tennessee Court of Appeals, in Ringling v. Tennessee Bd. of Paroles, 1997 WL 718409 at *2 (Tenn.Ct.App.1997), offered even greater protection:

In light of the Tennessee Supreme Court's clear and unequivocal holding that plea agreements, once approved by the trial court, become binding and enforceable contracts, see State v. Howington, 907 S.W.2d 403, 407 (Tenn.1995), we have decided prisoners who enter into and abide by the terms of the plea agreement should be able to seek judicial redress if the State breaches the contract. See Totty v. Tennessee Dep't of Correction, App. No.01A01-9504-CV-00139, 1995 WL 700205 at *2 (Tenn.Ct.App.Nov. 29, 1995) (No Tenn.R.App.P.11 application filed). For the State to negotiate a plea bargain on terms that it is either unprepared or unable to honor raises serious due process concerns affecting the validity of the plea bargaining process. Thus, with proper proof, a prisoner may be entitled to specific enforcement of his or her plea bargain agreement. (Emphasis Added).

In this matter, the State apparently negotiated the Agreement in bad faith because it had no intention of complying with the provision requiring that Petitioner be released upon completion of 30% of the sentence in incarceration. The State's bad faith is on clear display by the testimony that was given by the State's agents, the prosecutors, to the sentencing court advocating for the sentencing court to approve and accept the Agreement, which the sentencing court did. Then, the very same government agents, the prosecutors, testified, before the administrative

tribunal responsible for fulfilling the State's promise and obligation to release Petitioner from incarceration, that the release provision should not be followed and that the percentage of service term was too lenient and should be extended. The prosecutors diametrically contradictory testimony before two different tribunals cannot be condoned and must be punished.

Courts have stated that there is liability for parties who are not prepared to perform future obligations of a valid contract. The Tennessee Court of Appeals, in Ringling v. Tennessee Bd. of Paroles, 1997 WL 718419 (Tenn.Ct.App.1997), in footnote 2, stated:

In dealings between private parties, making a promise of future action with no present intent to perform is considered promissory fraud. See *Axline v. Kutner*, 863 S.W.2d 421, 423 (Tenn.Ct.App.1993); *Oak Ridge Precision Inus., Inc. v. First Tenn.Bank*, 835 S.W.2d 25, 28 (Tenn.Ct.App.1992).

Petitioner alleged that the State engaged in fraud based on the contradictory testimonies that the State agents gave to separate tribunals.

Petitioner complained that the government's breach of its promises and obligations contained in the Agreement and the bad faith actions by the government employees and agents injured Petitioner.

Petitioner, in his Complaint, complained that the contradictory testimony by the government agents and the State's failure to comply with the terms of the Agreement has injured Petitioner. Also, Petitioner, in his

Complaint objected to the government's failure to comply with the terms of the Agreement. Petitioner argues that the District Court erred by summarily dismissing Petitioner's Complaint without accepting as true Petitioner's factual allegation of the Agreement and the terms of the Agreement. Petitioner argues that the District Court should have allowed Petitioner to present the Agreement, proof of the State's breach of the Agreement, and proof of the tortious acts and omissions of the Respondents.

The District Court erroneously assumed that Petitioner was seeking to rescind the Agreement; however, Petitioner seeks just the opposite. Petitioner seeks to enforce the Agreement, including the promise and obligation that requires the State to release Petitioner because Petitioner has completed the agreed to percentage of service of 30% of the sentence in incarceration. Petitioner detrimentally relied on the Agreement and the representations made by the State's agents at the time that the Agreement was negotiated and executed, because Petitioner has completed the required percentage of service in incarceration, 30%, but the State has failed to release Petitioner. The State has breached the Agreement, and violated the representations that the State's agents made to the sentencing court, because Petitioner remains incarcerated even though, based on the State's own calculations, Petitioner completed service of 30% of the

sentence in incarceration and was ready for release on or before October 7, 2019 based on the State's calculations.

The State has not only breached the Agreement by failing to release Petitioner pursuant to the Agreement, but the State has also violated the judgment order. State agencies are strictly prohibited from modifying court judgments. Pursuant to both Federal Rule of Criminal Procedure 11 and Tennessee Rule of Criminal Procedure 11, once a court approves and accepts a plea agreement, no one, not even a government agency, is permitted or authorized to modify a plea agreement or court judgment. All parties are to comply with the plea agreement and the court judgment. The following cases support of these principles: (i) Matzell v. McKoy, 2021 WL 4619619 (N.D. New York, 2021) (State agency has no power to alter a judgment); (ii) Coleman at *11 (Tenn.Crim.Ct.2018) ("When the parties have entered a plea agreement which is dispositive of all sentencing issues, the trial court... "must accept the agreement in its entirety, including the agreed upon sentence." [internal citations omitted]); and (iii) Robinson v. Whisman, 2012 WL 1900551 (Tenn.Ct.App.2012) (State agency cannot alter or modify a court judgment and must comply with a court judgment).

Petitioner argues that the facts he alleged must be accepted as true and the following is an analytical framework to review this matter:

- a. The State, through its agents, the prosecutors, entered into the Agreement with Petitioner. The Agreement provided that Petitioner would be released upon completing service of 30% of the sentence in incarceration. The State made “a promise of future action” to release Petitioner upon Petitioner’s completion of 30% of service in incarceration. Based upon the agreement, Petitioner immediately began service in incarceration of the 30% of the sentence.
- b. Petitioner presumed that the prosecutors negotiated the Agreement in good faith with the expectation that the State would perform its obligation to release Petitioner when he completed service of 30% of the sentence in incarceration.
- c. Based upon the representations by the prosecutors, the sentencing court approved and accepted the Agreement pursuant to Tennessee Rule of Criminal Procedure 11 and entered a judgment order memorializing the Agreement.
- d. Pursuant to the authorities referenced herein, special due process rights protect the integrity of the promises and obligations contained in the Agreement, including the State’s promise to release Petitioner when he completed service of 30% of the sentence in incarceration. Based on

the State's calculations, Petitioner completed the service obligation in and was ready for release on or before October 7, 2019.

- e. During the proceeding in which the State was to fulfill its obligation to release Petitioner, the prosecutors testified to the administrative tribunal that the Agreement and the agreed to percentage of service should not be honored and Petitioner should not be released even though Petitioner had fulfilled his obligation.
- f. The State breached the Agreement because the State failed, and continues to fail, to honor its promise and obligation under the Agreement to release Petitioner because Petitioner remains incarcerated. The State has breached the Agreement and has violated the sentencing court's judgment orders.
- g. Petitioner brought his complaint to enforce the special due process rights that protect the sanctity and integrity of the Agreement and to compel the State to comply with and fulfill the promises and obligations that the State agreed to in the Agreement.

Petitioner seeks for this matter to be remanded so that it can proceed.

Synthesis

The State has violated the "pledge of the public faith" because the State failed to comply with and fulfill its obligations and promises contained

in the Agreement. Howington at 408. The State, even though the "public justifiably expects the State, above all others, to keep its bond", has trampled due process protections, breached the Agreement, and violated the sentencing court's judgment order. Id..

The State, through its agents, induced Petitioner to enter into the attached Agreement. The Agreement was accepted by the sentencing court and memorialized as a judgment order, pursuant to Tennessee Rule of Criminal Procedure 11. The Petitioner fulfilled his obligations under the Agreement. Then, when the State calculates that the time has arrived for the State to comply and fulfill its promises and obligations under the Agreement and judgment order, the State does not fulfill its promises and obligations and breaches the Agreement and violates that sentencing court's judgment order.

In this matter, the State has engaged in acts, omissions, and deceptions with the result being that the State breached the Agreement and violated a judgment order.

REASONS THAT SUPPORT GRANTING THIS PETITION

Petitioner filed his verified Complaint alleging facts that satisfied the requirements of Federal Rule of Civil Procedure 8(a)(2), including, but not limited to alleging the State's breach of the Agreement,.

Petitioner argues that the District Court erred by (i) mischaracterizing Petitioner's allegations in his Complaint and also by (ii) failing to accept all factual allegations as true. Petitioner also argues that the District Court erred by failing to draw any reasonable inferences in Petitioner's favor. Petitioner argues that he has a "special" due process right to enforce the promises and obligations made by the State and contained in the Agreement.

Petitioner's Suggested Answers to the Questions Presented

1. Whether the District Court erred by summarily dismissing Petitioner's Complaint by failing to accept as true all of Petitioner's factual allegations and drawing all reasonable inferences in favor of Petitioner. Petitioner alleged facts in his verified Complaint that give rise to claims and causes of action including, but not limited to, breach of Agreement, tortious interference, violations of due process, and other claims. The District Court, in summarily dismissing Petitioner's Complaint, erred by failing to accept Petitioner's allegations as true and drawing all reasonable inferences in favor of Petitioner. This matter should be remanded to the District Court for this matter to proceed.
2. Whether the District Court erred by failing to protect Petitioner's due process rights to enforce the terms of an Agreement that the State had

previously entered into with Petitioner. Plea agreements are special contracts with special due protections which are not to be taken lightly and which are to be fiercely protected. Pledges made by state officials in their public capacity are not to be lightly disregarded and the pledges are to be fulfilled. The public justifiably expects the State, above all others, to keep its bond. In this matter, state officials in their public capacity made promises to perform obligations which were expressed in an Agreement. Petitioner fulfilled his promises and obligations under the Agreement and the time arrived for the State to fulfill its promises and obligations under the Agreement; however, the State has and continues to fail to fulfill its promises and obligations under the Agreement. Petitioner has due process rights to compel the State to fulfill its promises and obligations which induced Petitioner to enter into the Agreement.

CONCLUSION

Reason, logic, and caselaw authorities dictate that once a plea agreement is accepted by a court, it cannot be altered by anyone including the government. In this matter, Petitioner alleged and objected to the government's alteration of the terms of the Agreement when the time for the government to perform its obligations under the Agreement arose. Petitioner detrimentally relied on the representations of the government

agents and the express terms of the Agreement and judgment order by completing the agreed to percentage service in incarceration. However, upon Petitioner completing his obligation under the Agreement and the judgment orders, the government reneged and breached the Agreement, and violated the judgment orders, by failing to release Petitioner.

The government, and its agents, must be held accountable to the obligations and promises that it agrees to and, also, must be held accountable to follow court judgments. This basic necessity to hold the government accountable is especially true when a person has detrimentally relied on the promises of the government by performing and fulfilling his obligations under the agreement and then the government either “explicit[ly] repudiates” or “end-runs around” the obligations that the government promised. See Warren at 448.

Petitioner relies on the robust due process rights in bringing this lawsuit to protect his interests and rights under the Agreement that Petitioner entered into with the government.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and remand this matter to the District Court to proceed to a hearing on the merits.

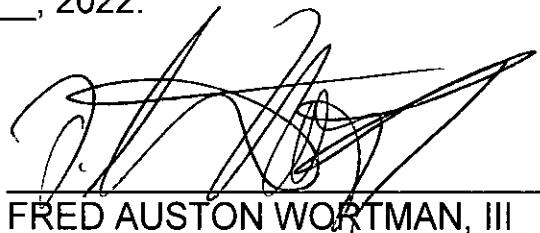
Respectfully submitted,



FRED AUSTON WORTMAN, III
Petitioner Pro Se
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CERTIFICATE OF SERVICE

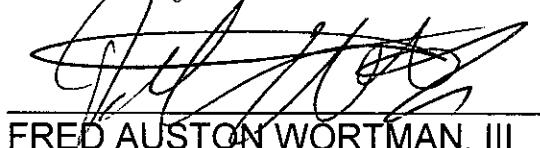
I hereby certify that a true and exact copy of the foregoing petition for writ of certiorari has been forwarded by first-class mail, postage prepaid, to Tennessee Attorney General, P.O. Box 20207, Nashville, TN 37202, on this the 17th day of June, 2022.



FRED AUSTON WORTMAN, III

DECLARATION OF MAILING

I, the undersigned, declare under the penalty of perjury that I have placed the foregoing document with the appropriate mailroom officials at the Morgan County Correctional Complex with sufficient First Class Postage to reach its destination on this the 17th day of June, 2022.



FRED AUSTON WORTMAN, III